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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

B.P.,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS
COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Real Party in Interest.

F074046

(Super. Ct. Nos. 517453, 517454)

OPINION

THE COURT*

ORIGINAL PROCEEDING; petition for extraordinary writ review. Edward M. Lacy, Jr., Judge. (Retired Judge of the Stanislaus Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

B.P., in pro. per., for Petitioner.

No appearance for Respondent.

John P. Doering, County Counsel, and Maria Elena Ratliff, Deputy County Counsel, for Real Party in Interest.

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* Before Kane, Acting P.J., Poochigian, J. and Smith, J.

B.P. (mother) in propria persona seeks extraordinary writ relief from the juvenile court's order selecting foster care as the permanent plan under Welfare and Institutions Code section 366.26, subdivision (b)(7)¹ at a hearing on a supplemental petition (§ 387) concerning her now 11-year-old son, Quintin M., and seven-year-old daughter, N.M. Mother contends the juvenile court lacked the authority to order the children into long-term foster care. We concur and grant the petition.

PROCEDURAL AND FACTUAL SUMMARY

This dependency case originated in San Luis Obispo County in September 2013, when the children, then eight-year-old Quintin and four-year-old N.M., were removed from the custody of mother and their father, Jeremy M. Mother was acting erratically and screaming profanities. The house was littered with items and one of the windows was broken. Quintin reported that they had no running water, no electricity and little food.

Jeremy reported that mother was hearing voices, was not making sense, and was verbally abusive. He thought she may be “coming down” from methamphetamine. He said he used methamphetamine once or twice a week and had done so for the past year. They were being evicted and planning to move to Modesto where he hoped to find a job.

The San Luis Obispo County juvenile court removed the children from parental custody and ordered mother and Jeremy to participate in parenting instruction and substance abuse services. Mother was additionally ordered to undergo a mental health evaluation and participate in domestic violence treatment.

Mother and Jeremy actively participated in their reunification services and were regularly enjoying unsupervised visitation with the children. In October 2014, at the 12-month review hearing, the juvenile court returned the children to their custody under family maintenance.

¹ Statutory references are to the Welfare and Institutions Code.

The juvenile court continued family maintenance services for the family over the ensuing year and a half. During that time, mother and Jeremy separated and mother struggled to maintain her sobriety, participate in services, and provide for the children. In June 2015, she relapsed but continued to participate in substance abuse services. Jeremy also struggled with maintaining sobriety and was in and out of treatment programs.

In November 2015, the San Luis Obispo juvenile court transferred the case to Stanislaus County. In January 2016, social workers with the Stanislaus County Community Services Agency (agency) met with mother to reassess her case. By that time, mother had relapsed several times, including January 1, 2016, when she drank two 16-ounce beers and “did a line of methamphetamine” with other adults in her cousin’s home. Approximately one hour later, she drove home with the children in the car.

The agency took the children, then 10-year-old Quintin and six-year-old N.M., into protective custody and placed them with a relative. The agency filed a supplemental petition (§ 387) on their behalf, alleging family maintenance services had been ineffective in protecting them.

In April 2016, the Stanislaus County juvenile court convened a hearing on the supplemental petition (the hearing). The agency recommended that the court adjudge the children dependents, remove them from parental custody and deny both parents reunification services under section 361.5, subdivision (b)(13) because of their extensive, abusive and chronic use of drugs or alcohol and resistance to treatment. The juvenile court sustained the petition.

The juvenile court continued the hearing and requested briefing from counsel on its dispositional options. The court stated it would not issue a dispositional order that would permit mother’s parental rights to be terminated. However, it would also not return the children to her custody without agency involvement. The court’s preference was to continue reunification services for her if legally possible. County counsel argued that the court could not continue services for mother because she had reached the

statutory limitation on services. County counsel also acknowledged that mother and the children were bonded and stated that the agency's recommendation was to place the children with the relatives under a legal guardianship.

On May 16, 2016, at the continued hearing, the juvenile court informed counsel that it had reviewed the briefing and determined it could not continue reunification services for mother. The court also stated that it did not see any need to consider adoption or guardianship. Instead, the court, over county counsel's objection, ordered that the children remain in foster care under section 366.26, subdivision (b)(7) subject to periodic review by the court under section 366.3. The court set the review hearing for October 18, 2016.

The minute order for the hearing does not reflect the juvenile court's order placing the children in foster care. Instead, it refers to the court's "***Ruling***" and indicates that a section 366.26 hearing is set for October 18, 2016. The court's ruling orders the children removed from parental custody and placed in the care and custody of the agency. On July 12, 2016, the juvenile court issued an order nunc pro tunc denying mother reunification services under section 361.5, subdivision (a)(3) and father services under section 361.5, subdivision (b)(13) and advising them of their right to file a writ petition.

This petition ensued.

DISCUSSION

Mother contends the juvenile court erred in ordering the children into foster care. We agree.²

When family circumstances necessitate the filing of a supplemental petition, the juvenile court must conduct a hearing on the petition. (§ 387; Cal. Rules of Court, rule

² Real party in interest asks this court to dismiss mother's petition as facially inadequate because it does not strictly conform to the content and notice requirements of California Rules of Court, rule 8.452(b). We decline to do so.

5.565(e).)³ At that hearing, the juvenile court applies the same procedures that govern dispositional hearings on a section 300 petition; the court must decide whether to leave the child in parental custody or remove the child and whether to provide services. (Rules 5.565(e)(2); 5.695(a).) If, as here, the juvenile court returned the child to parental custody at the 12-month review hearing and removes the child again after sustaining a supplemental petition and the parent has received the maximum allowable months of reunification services, the court must set a section 366.26 hearing. (Rule 5.565(f).)⁴

According to the minute orders of the May 2016 hearing, the juvenile court set a section 366.26 hearing and scheduled it for October 18, 2016. However, in its oral pronouncement for the same hearing, the juvenile court selected a permanent plan of long-term foster care under section 366.26, subdivision (b)(7) and set a review hearing under section 366.3 for the same date, thus creating a conflict in the record.

“When a clerk’s transcript conflicts with a reporter’s transcript, the question of which of the two controls is determined by consideration of the circumstances of each case.” (*People v. Malabag* (1997) 51 Cal.App.4th 1419, 1422-1423.) “ ‘It may be said ... as a general rule that when ... the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation].’ ” (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Under the circumstances of this case, we find the reporter’s transcript is entitled to greater credence relative to the court’s intentions, given

³ Rule references are to the California Rules of Court.

⁴ Section 361.5, subdivision (a), the statute governing the duration of reunification services, authorizes up to 18 months of services (reunification and maintenance services combined) from the date the child was originally removed from parental custody. (§ 361.5, subd. (a)(3); *Carolyn R. v. Superior Court* (1995) 41 Cal.App.4th 159, 166-167.) Mother’s children were originally removed in September 2013. By May 2016, she had received well over 18 months of services which is why the juvenile court could not continue services for her.

the juvenile court's lengthy discussion of its intent to proceed under section 366.26, subdivision (b)(7).

Section 366.26, subdivision (b) lists seven options from which the juvenile court may select a permanent plan at the section 366.26 hearing. The options are listed in order of preference. Adoption is the preferred permanent plan, followed by legal guardianship. Foster care with periodic review, the option chosen by the court and contained in section 366.26, subdivision (b)(7), is the least preferable option. (§ 366.26, subd. (b)(1)-(7).)

Here, the juvenile court's decision to order the children into foster care was not made at a section 366.26 hearing but rather at a hearing on a supplemental petition where the parent had received more than the maximum allowable months of court-ordered services under section 361.5, subdivision (a). Section 361.5, subdivision (a) does not, however, authorize the court to select a permanent plan. Rather, it requires the court to set a section 366.26 hearing to determine whether adoption, guardianship or long-term foster care is the appropriate plan for the child.

“When a court with fundamental jurisdiction over the persons and subject matter in question acts contrary to a statutory procedure or applicable rules, it does not act without jurisdiction, but rather in excess of jurisdiction.” (*In re Z.S.* (2015) 235 Cal.App.4th 754, 770.) “ ‘Acts in excess of jurisdiction are not void in any fundamental sense but are, at most, voidable if properly raised by an interested party.’ ” (*Ibid.*)

Reviewing courts have repeatedly allowed acts in excess of jurisdiction to stand when the acts were beneficial to all parties and did not violate public policy. On the other hand, courts have voided acts in excess of jurisdiction when the irregularity was too great, or when the act violated a comprehensive statutory scheme or offended public policy. (*In re Andres G.* (1998) 64 Cal.App.4th 476, 482-483.)

The juvenile court's order selecting a permanent plan of foster care violated the dependency statutory scheme requiring it to set a section 366.26 hearing to select a permanent plan. Consequently, the court's order is voidable and must be vacated.

DISPOSITION

Let an extraordinary writ issue directing the juvenile court to vacate its May 16, 2016 orders placing Quintin and N.M. into long-term foster care and setting a section 366.3 hearing. The juvenile court's orders removing Quintin and N.M. from mother's custody and setting a section 366.26 hearing are affirmed. This opinion is final forthwith as to this court.